Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1945

In The
Supreme Court of the United States
October Term, 1986

VARIAN ASSOCIATES, INC.,
Petitioner,

vs.

MILTON UTLEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an employee files an action in a state court for wrongful discharge growing out of violations of state statutory and common law and seeks to incorporate into the state law the employer's status as a federal contractor with affirmative action obligations under a federal executive order which does not create a private cause of action, can the case be removed to a federal court on the basis of "arising under" federal-question jurisdiction?

Respondent opposes the granting of the writ; however, if the writ is granted, respondent requests that the Court consider the following questions:

2. When Congress, in enacting Title VII of the Civil Rights Act of 1964, has expressly indicated that an employee subject to discrimination may pursue state remedies and when courts have recognized that Executive Order No. 11246 can be incorporated into other statutes, are claims based on the incorporation by reference of the executive order into the California Fair Employment and Housing Act, relating to job discrimination, and the California Unfair Competition Act preempted by federal law?

3. When California has enacted a comprehensive statutory scheme to deal with job discrimination that has been interpreted by the California courts to provide broader remedies than the comparable federal legislation under Title VII of the Civil Rights Act of 1964, when California has a statute against unfair competition, and when no California court has decided whether a claim for racial discrimination in violation of an affirmative action obligation

imposed on an employer under a federal executive order can create a cause of action under either of these California state statutes, did the District Court properly refuse to abstain from exercising federal jurisdiction and to remand the case to the state courts?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Milton Utley ("Utley") objects to the portion of the Statement of the Case of petitioner Varian Associates, Inc. ("Varian") in which Varian asserts that Utley's amended complaint is predicated on the theory that Varian was obligated to allow Utley to displace a non-minority employee and that Utley's right to recover "hinged completely upon whether the executive order and its regulations required the specified conduct and upon whether Varian complied with those requirements." (Petition, pp. 3-4.) There is no such allegation in the amended complaint, and Utley's theories are that because Varian was a government contractor with affirmative action obligations, under California law any proposed management decisions by Varian had to be made with affirmative action obligations in mind, or that Varian was required to have made a greater effort than it did to retain Utley or to find him another position in another facility or division of Varian. Because Varian removed the case from the state court before Utley has completed his discovery, Utley is not now in a position to articulate fully all of his theories.

Utley disagrees with Varian's interpretation of the opinion of the Court of Appeals, in that contrary to the assertion of Varian, the Court of Appeals did not "agree" that the affirmative action claims were predicated "solely" on Varian's alleged violation of federal law and that they necessarily turned on the resolution of the federal question. (Petition, p. 5.) Although the Court of Appeals acknowledged that Utley's state claims are based on

Varian's alleged violation of federal law, it did not conclude that the claims were predicated "solely" on this alleged violation or that the claims "necessarily" turn on the resolution of the federal question.

REASONS FOR DENYING THE WRIT

This Court should deny the petition because the decision of the Court of Appeals correctly interpreted the decisions of this Court on federal-question jurisdiction, and there is no real threat to the uniformity of application and the integrity of administrative procedures established under federal law. Moreover, there is no conflict between the decision of the Ninth Circuit and one in another circuit.

ARGUMENT

I. THE NINTH CIRCUIT PROPERLY INTERPRETED THIS COURT'S DECISION IN MERRELL DOW.

Varian has misread the majority opinion of this Court in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, — U.S. —, 106 S.Ct. 3229 (1986), which was interpreted properly and followed by the Court of Appeals. The majority opinion in *Merrell Dow* declined to recognize a species of "arising under" jurisdiction in cases in which a plaintiff seeks in a state court private cause of action to incorporate a federal standard when Congress had intended that there not be a federal private action for vio-

lations of that federal standard. The majority of this Court in *Merrell Dow* refused to interpret *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), as establishing rigid formulas for the determination of "arising under" jurisdiction. The majority initially observed:

> As was true in *Franchise Tax Board, supra,* the propriety of the removal in this case thus turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts. There is no 'single, precise definition' of that concept; rather, 'the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.' [*Franchise Tax Board*, 463 U.S. 1, 8.]
>
> (— U.S. —, —, 106 S.Ct. 3229, 3232 (1986).)

Considering a determination whether "arising under" federal jurisdiction is conferred when a plaintiff in a state court seeks to incorporate certain federal standards, the majority in *Merrell Dow* were concerned with the policy considerations involving the proper allocation of judicial resources and the due regard for federal-state relations. Later in the opinion, the majority noted:

> Far from creating some kind of automatic test, *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. This conclusion is fully consistent

> with the very sentence relied on so heavily by the petitioner. We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction.
>
> (— U.S. —, —, 106 S.Ct. 3229, 3235-36 (1986).)

As the majority opinion amplified in footnote 12, the importance of the nature of the federal issue in federal-question jurisdiction is of significance in determining the existence of federal jurisdiction. The reference to a federal statute or, as in this case, an executive order in a situation in which no private right of action can be implied does not create the type of federal issue in a state cause of action that confers federal-question jurisdiction.

As in the Court of Appeals, Varian has mischaracterized the "federal question." Utley has sued under two California statutes: the California Fair Employment and Housing Act, California Government Code § 12940, which prevents an employer from discharging or discriminating against an employee because of race, and California Business and Professions Code § 17200, which prevents unlawful business practices. The gravamen of Utley's claim is that because Varian, as a federal contractor, had affirmative action duties under Executive Order No. 11246, 30 Fed.Reg. 12319 (1965), *reprinted in* 42 U.S.C. 2000e app. at 28-31 (1982), and its implementing regulations, 41 C.F.R. ch. 60 (1985), a California court, in interpreting the California statutes, can establish, as a matter of California law, the nature and extent of Varian's affirmative action obligations and can decide whether Varian's con-

duct violated the California statutes. The California court need not interpret the regulations and decide that Varian violated a specific federal regulation. The status of Varian as an "equal opportunity employer" with affirmative action obligations can create duties under the California statutes different from those imposed on an employer with no "affirmative action" obligations.

Varian also has overstated Utley's contentions concerning affirmative action. Contrary to Varian's suggestion, Utley has not contended, in his amended complaint or in any of the formal discovery documents, that Varian is liable to him because Varian did not "allow him to displace a non-minority employee." (Petition, p. 3.) Utley essentially contends that because he was an employee of a federal contractor which had an affirmative action obligation under the executive order, Utley had a protected status analogous to that of an employee of contractors with the State that is recognized by California Government Code § 12990.

In addition, Varian has misinterpreted and mischaracterized the requirement in the majority opinion in *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* — U.S. —, 106 S.Ct. 3229 (1986), of the existence of a private right of action in federal court as a precondition for "arising under" jurisdiction by suggesting that certain administrative remedies—obviously, including those provided by the implementing regulations to Executive Order No. 11246—are tantamount to a "federal cause of action," "private federal remedy," "federal private cause of action," "federal remedy," and "private federal cause of

action''—terms mentioned by the majority in *Merrell Dow*. (Petition, p. 10.) *McMahon v. United States,* 186 F.2d 227, 230 (3d Cir. 1950), cited by Varian, does not support the analysis. *McMahon* involved a suit in admiralty under the Suits in Admiralty Act and the Clarification Act which expressly provided for suit after a claim was administratively disallowed in whole or in part. Moreover, Varian conveniently has ignored, that the Federal Food, Drug, and Cosmetic Act (''FDCA''), 52 Stat. 1040, as amended, 21 U.S.C. §§ 301 *et seq.* (1982 ed. Supp. II), which was involved in *Merrell Dow,* has an administrative enforcement scheme, including the authority of the FDA to obtain an ex parte court order for the seizure of goods, the authority to initiate proceedings in court to enjoin continuing violations of the FDCA, and the authority to request a United States Attorney to bring criminal proceedings against violators. *Merrell Dow,* — U.S. —, 106 S.Ct. 3229, 3244 (1986) (Brennan, J., dissenting). If the existence of this administrative enforcement scheme was not sufficient in *Merrell Dow* to confer ''arising under'' jurisdiction, the existence of the administrative enforcement scheme under Executive Order No. 11246 similiarly should not create jurisdiction in this case.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT PRESENT A CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

Varian has contended incorrectly that the decision of the Ninth Circuit conflicts with *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert. denied* 389 U.S. 977 (1967). *Farkas* did not involve the removal of an action from a state court, but rather was an action

that initially was filed in a federal court, unsuccessfully asserting the existence of a private federal civil action for violation of the predecessor to Executive Order No. 11246. A careful reading of the majority opinion in *Merrell Dow* indicates that the policy considerations for the exercise of "arising under" jurisdiction differentiate the exercise of removal federal-question jurisdiction from federal-question jurisdiction in actions filed originally in a federal district court.

The decision of this Court in *Bell v. Hood*, 327 U.S. 678, 682 (1946), similarly involved a case originally filed in a federal district court.

III. ANY FEDERAL INTEREST IN THE INTERPRETATION OF THE EXECUTIVE ORDER IS PRESERVED ADEQUATELY.

Varian has contended that federal jurisdiction should be recognized in order to insure uniformity of application of the administrative scheme and to utilize the expertise of federal courts in interpreting and applying federal law. (Petition, pp. 13-17.) This argument was expressly rejected by the majority in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, — U.S. —, 106 S.Ct. 3229, 3236-37 (1986), on the ground that the argument is more properly that of pre-emption, which can be raised in the state courts with ultimate review in this Court.

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CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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Dated: June 30, 1987

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